Ventra v 377 Greenwich LLC
2022 NY Slip Op 32175(U)
July 8, 2022
Supreme Court, New York County
Docket Number: Index No. 155071/2019
Judge: David B. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART** **58**

Justice

---X

THOMAS VENTRA,

Plaintiff,

- v -

377 GREENWICH LLC,

Defendant.

---X

INDEX NO. 155071/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for SUMMARY JUDGMENT .

In this personal injury action, Defendant 377 Greenwich LLC moves, pursuant to CPLR 3212, for summary judgment dismissing dismiss the complaint. Plaintiff Thomas Ventra opposes the motion. After consideration of the parties' arguments, as well as the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from an incident on May 16, 2018, in which Plaintiff fell on an allegedly defective sidewalk adjoining the real property located at 377 Greenwich Street in Manhattan, New York, which was owned by Defendant. Doc. 1 at ¶¶ 11-13. In his complaint, Plaintiff claimed that he sustained serious and permanent injuries due to the negligence of the Defendant in failing to maintain the sidewalk in a reasonably safe condition. *Id.*

At his deposition, Plaintiff testified that, on the day of the accident, he was on his way to the bank when he slipped and fell while crossing Greenwich Street between Franklin and North Moore Streets. Doc. 34 at 86, 92, 106. After he crossed the street, he put his right foot onto the

sidewalk, about one foot from the curb, and as he did so, his right foot slipped and he fell and hit the concrete sidewalk. Doc. 34 at 112-114.

One day after the accident, Plaintiff sought medical aid by contacting the Charles B. Wang Community Health Center ("the WCHC") to discuss his injury. A medical report issued by the WCHC summarized the content of the May 17, 2018 telephone call as follows: "Patient on the phone stated that he fell yesterday during the rain, fell on the street curb, landed on his right side with full bodyweight." Doc. 35 at 102.

Three days after the accident, Plaintiff went to New York Presbyterian Medical Center ("NYP") for treatment. Doc. 35 at 90. The doctor at NYP summarized the accident as follows: "65yoM s/p mechanical fall 3 days ago while crossing the street when he lost his footing when stepping onto the curb. He fell on his right side, unable to break his fall. He was unable to bear weight or ambulate." *Id.* Then, on July 31, 2018, two months after the alleged incident, Plaintiff treated again at the WCHC, where another report was issued stating as follows: "in mid-May, mechanical fall outside on curb." Doc. 35 at 80.

Despite the medical records of WCHC and NYP, however, Plaintiff explicitly denied at his deposition that he ever told anyone that he slipped and fell on a curb. Doc. 34 at 120. He further maintained that he fell after placing his foot onto the sidewalk after crossing the street. Doc. 34 at 109. When asked what caused his fall, Plaintiff said he was not sure because he had never fallen like that before and that "it still mind boggles me to this day." Doc. 34 at 253. He also stated at his deposition "I know the thing was sloped, but I don't know if there was visible slipness [sic] to it or something, I have no idea." *Id.*

Defendant now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. In support of the motion, Defendant argues that, even if a defective condition existed,

Plaintiff has not established that such condition proximately caused his injury. Doc. 26 at 13. Defendant claims that the affidavit of Plaintiff's expert submitted in opposition to the motion "is purely speculative and unsupported by any actual evidence." Doc. 26 at 14. Further, Defendant asserts that Plaintiff unequivocally admitted at his deposition that he did not know what caused his fall and did not see any defect present. Doc. 26 at 6.

Defendant submits the sworn affidavit of David E. Behnken, P.E. in support of its motion. Behnken opines that the sidewalk was properly constructed and was not defective. Doc. 28 at 6. He further opines that the slope of the sidewalk would have provided Plaintiff with more traction. Doc. 28 at 4. He thus concludes that the condition of the sidewalk did not cause or contribute to Plaintiff's accident. Doc. 28 at 5.

In opposition, Plaintiff submits the affidavit of Steve Zalben, a registered architect. Plaintiff's expert claims that the cross slope of the concrete sidewalk flags adjacent to the curb was 10.8%, exceeding the established standard of 5% outlined in the New York City Department of Transportation Highway Rules (1/20/02), Section 2-09.f.4.xi. Doc. 42 at 4. Thus, he concludes that the sidewalk had a "substantial defect" and that that Defendant's failure to repair the alleged defect "contributed to the cause of the injury." Doc. 42 at 6.

LEGAL CONCLUSIONS

A party moving for summary judgment is entitled to judgment as a matter of law if it provides sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1985]). In deciding a motion for summary judgment, a court must view the facts "in the light most favorable to the non-moving party" (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, then the burden shifts to the nonmoving party to

present evidentiary facts "sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]); *see also Zuckerman v New York*, 49 NY2d 557, 562 [1980]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a triable issue (*see Zuckerman*, 49 NY2d at 562; *see also Daliendo v Johnson*, 147 AD2d 312, 317 [2d Dept 1989]).

In a negligence claim founded on a theory of premises liability, a Plaintiff must prove (1) that Defendant owed him a legal duty, (2) that Defendant was on notice of a defective condition for which it was responsible, (3) that Defendant breached a legal duty to Plaintiff, (4) that Defendants' breach of such duty was the proximate cause of Plaintiff's injuries, and (5) Plaintiff was in fact injured (*see Becker v Schwartz*, 46 NY2d 401, 410 [1978]; *see also Henry v Hamilton Equities, Inc.*, 34 NY3d 136, 142 [2019]). Thus, Defendant need only demonstrate that Plaintiff's claim is insufficient with respect to at least one of the necessary elements to establish entitlement to summary judgment (*see Armstrong v Ogden Allied Facility Mgt. Corp.*, 281 AD2d 317, 318 [1st Dept 2001]).

Defendant argues that, even if a defective condition existed, Plaintiff has not established that such condition proximately caused his injury. Doc. 26 at 13. To properly allege that a defect caused a plaintiff's injury, a plaintiff must provide enough facts to permit a reasonable inference of causation (*see Reed v Piran Realty Corp.*, 30 AD3d 319, 319 [1st Dept 2006]). "Ordinarily, the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants" (*Murphy v Conner*, 84 NY2d 969, 972 [1994]). However, an expert's opinion must be more than a "speculative and conclusory assertion" (*see Smith v Johnson Products Co.*, 95 AD2d 675, 676 [1st Dept 1983]; *see also Hartman v Mt. Valley Brew Pub, Inc.*, 301 AD2d 570,

570 [2d Dept 2003]). Plaintiff's evidence need not exclude every possible cause of his fall, but it must be sufficient to permit a finding of proximate cause based on logical inferences, not speculation (*see Schneider v Kings Highway Hosp. Ctr.*, 67 NY2d 743, 744 [1986]).

A defendant can establish its prima facie entitlement to judgment as a matter of law by demonstrating through deposition testimony that a plaintiff is unable to identify the cause of his or her injury (*see Reed*, 30 AD3d at 320 ["defendants demonstrated prima facie entitlement to judgment as a matter of law through the deposition testimony of plaintiff and his girlfriend that they were unable to identify the cause of the fall."]). Additionally, if a defendant establishes its prima facie entitlement to summary judgment, then a plaintiff cannot defeat the motion unless he or she submits proof giving rise to a reasonable inference of causation (*see Murphy v Conner*, 84 NY2d 969, 972 [1994]).

Here, since Plaintiff testified that he did not know why he fell, Defendant established its prima facie entitlement to summary judgment (*see Reed*, 30 AD3d at 320). In opposition, Defendant has failed to raise an issue of fact regarding causation (*see id.*; *see also Kane v Estia Greek Rest., Inc.*, 4 AD3d 189, 190 [1st Dept 2004] ["absent an explication of facts explaining the accident, the verdict would rest on only speculation and guessing, warranting summary judgment."]).

In opposing a motion for summary judgment, a plaintiff must at least provide sufficient circumstantial evidence to raise an issue of fact (*see Rodriguez v Leggett Holdings, LLC*, 96 AD3d 555, 556 [1st Dept 2012]). Even if a plaintiff's expert opines that an accident was caused by a defect, he or she must still establish that the slip and fall was connected to the supposed defect, otherwise summary judgment dismissing the complaint is appropriate (*Kane v Estia Greek Rest., Inc.*, 4 AD3d 189, 190 [1st Dept 2004]).

Here, Plaintiff's expert did not connect Plaintiff's fall to the alleged defect and, thus, failed to raise a triable issue of fact (*see Batista v New York City Transit Auth.*, 66 AD3d 433, 434 [1st Dept 2009] [holding that plaintiff's expert's assertion was insufficient to raise an issue of fact as to proximate cause because there was no evidence connecting plaintiff's fall to the alleged defects]). Although Plaintiff's expert represents that the alleged defect "contributed to the cause of the injury" he does not discuss how he reached this conclusion and sets forth no mechanical explanation to substantiate the same. Doc. 42 at 6. Plaintiff's expert therefore proffers a conclusory and speculative opinion, insufficient to raise any triable issue of fact (*see Murphy*, 84 NY2d at 972; *see also Constantino v Webel*, 55 AD3d at 472-73 ["mere speculation as to the cause of an accident, when there could have been many possible causes, is fatal to a cause of action."]).

Moreover, neither Plaintiff nor his expert establish that the alleged defect even constituted a dangerous condition from which one could reasonably infer causation (*see Encarnacion v Tegford Realty LLC*, 60 AD3d 581, 582 [1st Dept 2009] [holding that Plaintiff did not sufficiently raise an issue of fact when Plaintiff's expert did not establish that the slope was a dangerous condition and Plaintiff did not claim at her deposition that the slope caused her accident]). At his deposition, Plaintiff admitted that the sidewalk was not structurally defective. Doc. 34 at 188. He said that the sidewalk was sloped and that he fell but did not know why. Doc. 34 at 253. Further, Plaintiff's expert does not connect Plaintiff's slip and fall to the alleged defect or submit any evidence allowing this Court to reasonably infer causation.

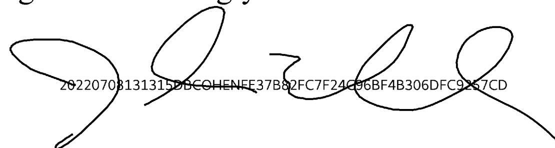
Since Plaintiff has not presented evidentiary facts sufficient to raise a triable issue of material fact as to whether the sidewalk slope proximately caused his injury, Defendant's motion is granted.

The parties' remaining contentions are either without merit or need not be addressed given the conclusions above.

Accordingly, it is hereby:

ORDERED that Defendant 377 Greenwich, LLC's motion for summary judgment dismissing the complaint pursuant to CPLR 3212 is granted and the complaint is dismissed, with costs and disbursements to Defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.



7/8/2022				DAVID B. COHEN, J.S.C.
DATE				
CHECK ONE:	X CASE DISPOSED		NON-FINAL DISPOSITION	
	X GRANTED	DENIED	GRANTED IN PART	OTHER
APPLICATION:	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	REFERENCE